Supreme Court, U. S.
FILED
1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-710

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and ERNEST GRAYSON, Superintendent - Petitioners

versus

NEWBURG AREA COUNCIL, INC., SARAH WHITE, JOHNIE WRIGHT and SUZANNE POST, ET AL. - - - Respondents

AND

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, ET AL. - Petitioners

versus

JOHN E. HAYCRAFT and HAZEL K. LANE, ET AL. - - - Respondents

L. J. HOLLENBACH, III, County Judge - Intervenor

(Other parties respondent on inside cover)

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN A. FULTON
WILL H. FULTON
1805 Kentucky Home Life Building
Louisville, Kentucky 40202

E. PRESTON YOUNG
722 Kentucky Home Life Building
Louisville, Kentucky 40202

Counsel for Petitioners, Board of Education of Jefferson County, Ky., and Superintendent Ernest Grayson

Of Counsel:
WOODWARD, HOBSON & FULTON

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

Additional Respondents in Board of Education v. Newburg:

Lyman Johnson, Richard Miller, Aaron Howard, John R. Hughes, Theresa Black, John Schmidt, Earl Alluisi, and American Federation of Teachers

Additional Respondents in Board of Education of Jefferson County versus Haycraft:

Lyman Johnson, Richard Miller, Aaron Howard, John R. Hughes, John Schmidt, Earl Alluisi, and Louisville and Jefferson County Federation of Teachers, Local 672, Newburg Area Council, Inc. and Kentucky Human Relations Commission.

INDEX

PAGE

Table of Authorities ..... ii–iii

Petition for Writ of Certiorari 1– 2

Reason for Supplemental Brief 2– 3

Additional Reasons for Granting the Writ 3–23

I. The Original Finding of a Constitutional Violation Must be Reexamined in Light of This Court's Recent Application of the Standard of *Washington* v. *Davis* to School Desegregation Litigation... 3–16

II. The Inclusion by the District Court in Its Desegregation Remedy of a Provision For Perpetual Realignment of Racial Quotas With a Specific "Triggering" Mechanism Demonstrates an Impermissible Goal of Racial Balance and Misapplication of the Decisions of this Court and Particularly The Concurring Opinion in *Austin Independent School District* v. *United States* 17–23

Conclusion 23–24

Certificate of Service 25

Addendum 27–32

Austin Independent School District v. *United States*, ____ U. S. ____ (1976) 45 L. W. 3413

AUTHORITIES

Cases:

PAGE

Austin Independent School District v. *United States*, ____ U. S. ____ (1976), 45 L. W. 3413....2, 3, 4, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

Austin Independent School District v. *United States*, 76-200, Brief for the United States.....12, 13–14

Brinkman v. *Gilligan*, 539 F. 2d 1084 (6th Cir. 1976), *cert. granted*, ____ U. S. ____ (1977), 45 L. W. 3489 .....19, 24

Brown v. *Allen*, 344 U. S. 443 (1953)..... 5

Brown v. *Board of Education of Topeka I*, 347 U. S. 483 (1954) 9–10, 11, 22

Cunningham v. *Grayson*, 541 F. 2d 538 (6th Cir. (1976) 2, 19, 23

Edelman v. *Jordan*, 415 U. S. 651 (1974)..... 5

Green v. *County School Board of New Kent County*, 391 U. S. 430, 442 (1968)..... 12

Hanover Shoe Inc. v. *United Shoe Machinery Corp.*, 392 U. S. 481, 488, Fn. 6 (1968)..... 6

Hughes Tool Company v. *Trans World Airlines, Inc.*, 379 U. S. 912 (1964)..... 6

Hughes Tool Company v. *Trans World Airlines, Inc.*, 380 U. S. 248 (1965)..... 6

Hughes Tool Company v. *Trans World Airlines, Inc.*, 409 U. S. 363 (1973)..... 5, 6

Keyes v. *School District No. 1*, 413 U. S. 189 (1973) 3, 4, 18

Maryland v. *Baltimore Radio Show, Inc.*, 338 U. S. 912 (1950) 5, 6

Massachusetts Board of Retirement v. *Murgia*, ____ U. S. ____ 96 S. Ct. 2562 (1976)..... 5

Mercer v. *Theriot*, 377 U. S. 152 (1964)..... 6

Milliken v. *Bradley*, 418 U. S. 717 (1974).....4, 5, 18

Newburg Area Council v. *Board of Education of Jefferson County, Ky.*, 6th Cir. 1973, 489 F. 2d 925, *(Newburg I)*, *vac.* 418 U. S. 918 (1974).....5, 10, 11, 12, 13, 16, 21

Cases: (Cont'd)

PAGE

Newburg Area Council v. *Board of Education of Jefferson County, Ky.*, 6th Cir. 1974, 510 F. 2d 1358 *(Newburg II)*, *cert. den.* 421 U. S. 931 (1975)... 5, 23

Newburg Area Council v. *Board of Education of Jefferson County, Ky.*, *appeal docketed*, No. 76-2301, 6th Cir., September 30, 1976 19

Pasadena City Board of Education v. *Spangler*, ____ U. S. ____ 96 S. Ct. 2697, 2705 (1976) .5, 18, 19, 20

School District of Omaha v. *U. S.*, 521 F. 2d 530 (8th Cir. 1975) and 541 F. 2d 708 (8th Cir. 1976) *cert. filed*, 45 L. W. 3401 24

Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971) 5, 15, 18, 20, 22

United States v. *Carver*, 260 U. S. 482 (1923)..... 5

United States v. *Texas Education Agency*, 5th Cir. 1972, 467 F. 2d 848 *(Austin I)*.....9, 10, 12, 20

United States v. *Texas Education Agency*, 5th Cir. 1976, 532 F. 2d 380 *(Austin II)* *vac.* ____ U. S. ____, 45 L. W. 3413.....4, 9, 10, 12, 17, 20, 21

Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 517 F. 2d 409 (7th Cir. 1975), ____ U. S. ____ (1977), 45 L. W. 4073.... 7, 8

Washington v. *Davis*, 426 U. S. 229 (1976)...3, 4, 6, 7, 8, 9, 10, 11, 16, 17, 24

Miscellaneous:

Equal Protection Clause, Fourteenth Amendment, United States Constitution 3, 4, 6, 7, 14, 16

Rules of the United States Supreme Court, Rule 24(5) 2, 3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-710

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and
ERNEST GRAYSON, Superintendent - *Petitioners*

v.

NEWBURG AREA COUNCIL, INC.,
SARAH WHITE,
JOHNIE WRIGHT and
SUZANNE POST, ET AL. - - - *Respondents*

AND

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, ET AL. - *Petitioners*

v.

JOHN E. HAYCRAFT and
HAZEL K. LANE, ET AL. - - - *Respondents*

L. J. HOLLENBACH, III, County Judge - *Intervenor*

(Other parties respondent on inside cover)

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

For the reasons set forth in the Petition for Writ of Certiorari previously filed herein and in this Supplemental Brief, the Petitioners, Board of Education

of Jefferson County, Kentucky and its Superintendent, Ernest Grayson, respectfully pray that a Writ of Certiorari issue to review the decision rendered in this case on August 23, 1976, by the United States Court of Appeals for the Sixth Circuit.

REASON FOR SUPPLEMENTAL BRIEF

On August 23, 1976, the United States Court of Appeals for the Sixth Circuit rendered its decision in *Cunningham* v. *Grayson,* 541 F. 2d 538 (6th Cir. 1976). In that decision the Court of Appeals affirmed the desegregation order of the United States District Court for the Western District of Kentucky at Louisville, entered on July 30, 1975. The Petitioners filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on November 20, 1976. A response was filed to the Petition by the former Board of Education of Louisville, Kentucky on or about December 15, 1976.

Since the filing of the Petition for Writ of Certiorari, this Court delivered its Per Curiam opinion in *Austin Independent School District* v. *United States,* —— U. S. ——, 1976, 45 L. W. 3413. Mr. Justice Powell filed a concurring opinion in that matter in which he was joined by the Chief Justice and Justice Rehnquist. This Supplemental Brief is directed to an analysis of the issues before the Court in this matter in light of the decision in the *Austin* case, *supra.*

This Supplemental Brief is filed pursuant to Rule 24(5) of the Rules of the Supreme Court of the United States which reads in its relevant part as follows:

> (5). Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of his last filing.

ADDITIONAL REASONS FOR GRANTING THE WRIT

I. The Original Finding of a Constitutional Violation Must Be Reexamined in Light of This Court's Recent Application of the Standard of *Washington* v. *Davis* to School Desegregation Litigation.

Certiorari should be granted by this Court so that the original decision of the Court of Appeals may be reexamined at this time to bring it into conformity with this Court's recent decisions. The majority opinion of this Court in *Austin, supra,* by its application of the rationale of *Washington* v. *Davis,* 426 U. S. 229 (1976), has indicated that in school desegregation cases, as in other types of civil rights litigation, the "state action" requirement of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution compels that any finding of a constitutional violation must be based upon a showing of more than just a racially disproportionate impact from official action.

This Court, in *Keyes* v. *School District No. 1,* 413 U. S. 189 (1973), enunciated the relevant burden of proof for those who wish to demonstrate a constitutional violation sufficient to justify a remedial desegregation order. The standard was referred to by analogy in *Washington* v. *Davis, supra.*

> The essential element of *de jure* segregation is "a current condition of segregation resulting from intentional state action. . . . the differentiating factor between *de jure* segregation and so-called *de facto* segregation. . . . is purpose or intent to segregate." *Washington* v. *Davis, supra,* 426 U. S. 229, 96 S. Ct. 2040, 2048, quoting *Keyes, supra,* 413 U. S. 189, 205, 208.

This Court's majority decision in *Austin, supra,* compels the application of this standard to school desegregation litigation where there is a history of *de jure* separation of the races. The factual situation in the case at bar is essentially similar to *Austin, supra,* in all relevant respects and consequently, this Court's recent action vacating *United States* v. *Texas Education Agency,* 5th Cir. 1976, 532 F. 2d 380 (*Austin II*) compels a reexamination of the Court of Appeals' original finding of a constitutional violation in this matter in 1973.

In December, 1973, the United States Court of Appeals for the Sixth Circuit reversed the decision of the district court of March 8, 1973, dismissing the complaint in these consolidated actions. The Court of Appeals found that the defendant school systems were operating dual school systems in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. This original decision of the Court of Appeals was vacated by this Court on other grounds and remanded to the Court of Appeals for reconsideration in light of this Court's concurrent decision in *Milliken* v. *Bradley,* 418 U. S. 717 (1974).

Newburg Area Council v. *Board of Education of Jefferson County, Ky.,* 6th Cir. 1973, 489 F. 2d 925 (*Newburg I*) *vac.* 418 U. S. 918 (1974).

Upon remand, the Court of Appeals distinguished *Milliken, supra,* and reinstated its finding in December, 1973 of a constitutional violation. A petition for writ of certiorari directed to that decision of the Court of Appeals was sought by the petitioners here and was denied by this Court. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky.,* 6th Cir. 1974, 510 F. 2d 1358 (*Newburg II*), *cert. den.* 421 U. S. 931 (1975).

It is a well established principle that the denial of certiorari by this Court in 1975 does not preclude a reexamination by this Court of the issues raised in the 1975 certiorari petition. *United States* v. *Carver,* 260 U. S. 482, 490 (1923). *Accord, Maryland* v. *Baltimore Radio Show,* 338 U. S. 912, 917 (1950); *Brown* v. *Allen,* 344 U. S. 443, 492 (1953); cf. *Edelman* v. *Jordan,* 415 U. S. 651, 671 (1974) and *Massachusetts Board of Retirement* v. *Murgia,* —— U. S. —— (1976), 96 S. Ct. 2562, 2564. *See generally Pasadena City Board of Education* v. *Spangler,* —— U. S. —— (1976), 96 S. Ct. 2697, 2705 and, *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 15-17 (1971) for the proposition that federal courts in desegregation litigation invoke equity jurisdiction.

This Court recently was confronted with the weight to be given prior certiorari proceedings in *Hughes Tool Company* v. *Trans World Airlines, Inc.,* 409 U. S. 363 (1973). In 1964 this Court granted Hughes Tool Com-

pany's petition for certiorari. *Hughes Tool Company* v. *Trans World Airlines, Inc.*, 379 U. S. 912 (1964). In March 1965, however, after argument, the writ of certiorari was dismissed as improvidently granted in a Per Curiam opinion of this Court. *Hughes Tool Company* v. *Trans World Airlines, Inc.*, 380 U. S. 248 (1965). Hughes Tool Company again sought a petition for writ of certiorari in this Court and in 1973, Justice Douglas, writing for the Court, held that the prior dismissal of the 1964 writ of certiorari as improvidently granted ". . . did not establish the law of the case or amount to *res adjudicata* on the points raised", citing with approval *Baltimore Radio Show, Inc., supra. Hughes Tool Company, supra,* 409 U. S. 363, 364, fn. 1.[1]

This Court has traditionally required as a condition precedent to the determination of a violation of the Equal Protection Clause a finding that the activity complained of was the product of *intentional* discrimination. In desegregation litigation this Court has required that segregative intent upon the part of the school authorities be shown to meet the minimum requirements of the "state action" component of the Equal Protection Clause. *Washington* v. *Davis* clearly holds that in meeting this burden, it is *not* sufficient

[1]See also *Hanover Shoe, Incorporated* v. *United Shoe Machinery Corporation,* 392 U. S. 481, 488, fn. 6 (1968) and *Mercer* v. *Theriot,* 377 U. S. 152 (1964) where the Court considered in a Per Curiam opinion joined in by eight Justices *both* substantial federal questions raised in an earlier petition for writ of certiorari which was denied *and* substantial federal questions raised by proceedings in the lower courts subsequent to the original denial of the first petition for writ of certiorari.

for making a finding of unconstitutional intent to demonstrate that activity which is racially neutral on its face has a racially disproportionate impact.

> . . . [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact. *Washington* v. *Davis, supra,* 96 S. Ct. 2040, 2047. (Emphasis by the Court.)

Justice White, writing for the majority in *Washington* v. *Davis,* presents a definitive compendium of the disparate treatment by this Court of this standard of proof in many areas of civil rights litigation.

> The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. . . . We have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. 96 S. Ct. 2040, 2048, 2049.

This Court has most recently acknowledged the viability of the standard of *Washington* v. *Davis, supra,* by its reversal in *Village of Arlington Heights* v. *Metro-*

politan Housing Development Corporation, 517 F. 2d 409 (7th Cir. 1975), *rev. and remanded,* —— U. S. —— (1977), 45 L.W. 4073. In *Arlington Heights, supra,* Justice Powell, writing for the majority, cited this Court's decision in *Washington* v. *Davis* as controlling. *Arlington Heights, supra,* 45 L. W. 4073, 4077.

Of even greater significance to the issues before the Court in this matter is the in-depth discussion in *Arlington Heights, supra,* of the appropriate standard for proving the racially discriminatory purpose required by *Washington* v. *Davis.* In *Arlington Heights,* this Court proceeded to apply the enunciated standard to the facts before it in that matter. *Arlington Heights, supra,* 45 L. W. 4073, 4077-78. The petition for certionari should be granted in *this* matter so that a similar application of the *Washington* v. *Davis* standard may now be made, since it is clear that the Court of Appeals has held the defendant school system to a standard never adhered to by this Court. The District Court clearly applied the *appropriate* constitutional standard in its original decisions in this matter in 1973 and found that the monolithic nature of the racially identifiable schools operated by the system at that time was indeed casually related to *segregated residential patterns* and was not exaccerbated by official action. Although the petitioners here feel that this original decision of the district court should be reinstated, it would be sufficient, upon a grant of certiorari by this Court, that an application of the standard of *Washington* v. *Davis* be undertaken independently by this Court

or upon remand by the United States Court of Appeals for the Sixth Circuit.

The application of the *Washington* v. *Davis* rationale to school desegregation litigation by the majority Per Curiam opinion of this Court in *Austin, supra,* is significant to this Court's disposition of this petition for writ of certiorari. The parallel between the factual situation with which the Fifth Circuit was confronted in *Austin I* and *Austin II*[2] and the factual situation presented to the Sixth Circuit throughout the appeliate proceedings in this matter is striking. Both Texas and Kentucky, prior to 1954, required the public school authorities to maintain separate educational facilities for black students and white students. As in most public school jurisdictions throughout this country, both the Austin Independent School District (AISD) and the school systems operating in Jefferson County, Kentucky based their attendance patterns on the familiar phenomenon of the neighborhood school.

The only significant factual distinctions between the two cases merely enhance the position of the petitioners here that the original determination of the Sixth Circuit in 1973 should be at the very least reexamined in light of *Washington* v. *Davis.* There is ample evidence in the record that significant steps were taken by both the former Board of Education of Jefferson County, Kentucky and the former Board of Education of Louisville, Kentucky immediately subsequent to this Court's decision in *Brown* v. *Board of Education of*

[2] *United States* v. *Texas Education Agency,* 5th Circuit 1972, 467 F. 2d 848 *(Austin I); United States* v. *Texas Education Agency,* 5th Circuit 1976, 532 F. 2d 380 *(Austin II).*

Topeka I, 347 U. S. 483 (1954) to eliminate the vestiges of previous state-imposed racial separation in the public schools. The record in *Austin I* and *Austin II* indicates a singular lack of any similar effort on behalf of the AISD, but this Court nevertheless properly vacated those decisions of the Fifth Circuit and remanded for a reconsideration of the question of the existence of a constitutional violation in light of *Washington* v. *Davis*.

The analysis of the United States Court of Appeals for the Sixth Circuit in *Newburg I* is somewhat more subtle than the inaccurate analysis of the Fifth Circuit in *Austin I* and *Austin II*, but it is nevertheless a misapplication of the leading decisions of this Court. The primary stumbling block of the Court of Appeals in *Newburg I* is the continued over-emphasis of racial identifiability of schools operated at that time by the defendant school systems.

> The Jefferson County school district thus has three elementary schools that either are or are rapidly becoming "racially identifiable." As stated, Newburg school, a pre-*Brown* black school, is racially identifiable while Price and Cane Run Schools are rapidly becoming racially identifiable as black schools. 489 F. 2d 925, 928.

In discussing the demographic situation in the former Louisville School District, the Court of Appeals again emphasized the racial identifiability of numerous schools operated by that system.

> A large number of racially identifiable schools in a school district that formerly practiced segregation by law gives rise to a presumption that all vestiges of state-imposed segregation have not been eliminated. *Newburg I*, 489 F. 2d 925.

The Court of Appeals went on in *Newburg I* to hold that evidence demonstrating the existence of racially monolithic schools in a school system with a history of *de jure* segregation is, *in and of itself*, conclusive of a constitutional violation by such a school system.

> Regardless of any explanation for the racial composition of any of the other schools in the system, the 35 pre-*Brown* schools that have retained their pre-*Brown* racial identification to the present day stand out as clear vestiges of state-imposed segregation. *Newburg I*, 489 F. 2d 925, 931.

The district court in its original decisions in this matter in March, 1973, acknowledged the continued racially monolithic nature of numerous schools operated by the defendant school systems. This original finding of fact was not questioned by the Court of Appeals in its reversal of the decisions of the district court. The reversal of the holding of the district court was based, however, upon the analysis of the import of the essentially uncontroverted facts. The analysis of the Court of Appeals in this regard, however, was incorrect in light of this Court's decisions in *Washington* v. *Davis* and *Austin, supra,* and this Court should accept certiorari at this time to review the application by the Court of Appeals of an incorrect constitutional standard.

The analysis of the Court of Appeals in *Newburg I* is improper in several respects. The Court of Appeals bases its decision in part on an incorrect assumption (which has never been supported by this Court) through its inference that racially monolithic schools are inherently inferior. This same erroneous assumption was made by the United States Court of Appeals for the Fifth Circuit in *Austin I* and *Austin II*. This type of analysis was specifically disapproved by Justice Powell in his concurring opinion in *Austin, supra.*

> Apparently misconceiving the import of language in *Green* v. *County School Board of New Kent County,* 391 U. S. 430, 442 (1968), to the effect that there should be no "Negro" school or "white" school, the Court of Appeals seems to believe that every school must be racially balanced to some degree . . . The effect of applying the language of *Green* to such a system may be to stigmatize—without justification—schools that can be identified as having a racial or ethnic majority. *Austin, supra,* 45 L.W. 3413, fn. 2.

The Solicitor General in the well reasoned brief on behalf of the United States in *Austin, supra,* points out the peculiar fallacy of this line of reasoning and its necessary consequence of massive busing whenever a determination of a constitutional violation is made in this manner. *Austin, supra,* 76-200, Brief for the United States, at 8, *et seq.*

The Court of Appeals in *Newburg I,* while not making the direct assertion that the use of neighborhood geographic school zoning which results in racially

monolithic schools is per se impermissible, clearly implies this result.

> Geographic zoning assignment is not a permissible method for a school board to employ in dismantling the dual system and eliminating all vestiges of state-imposed segregation if it does not work. *Newburg I,* 489 F. 2d 925, 931.

The Court of Appeals has confused a standard for remedial tools here with acceptable evidence of a constitutional violation. Certainly the propriety of actions of a school board could not be judged by a standard which this Court has never required. The use of neighborhood school zoning is not impermissible merely because it results in racially monolithic schools.

In *Austin, supra,* the United States did not oppose the granting of a petition for writ of certiorari directed to the United States Court of Appeals for the Fifth Circuit primarily due to the analysis by that Court of the propriety of the continued use in the South of the neighborhood school plan. As the analysis of the Court of Appeals in *Newburg I* is essentially similar to that struck down by this Court in *Austin, supra,* the excellent arguments of the Solicitor General are equally appropriate here.

> It does not follow, however, that the neighborhood school policy amounts to racial discrimination, unless the residential patterns are caused by official acts *designed* to segregate the schools. An otherwise neutral action is not discriminatory solely because it has a racially disproportionate effect. . . . By requiring the district court to infer

intent to discriminate from the fact that the school authorities have not attempted to ameliorate the effects of racial separation in residential patterns, the panel has avoided the need to prove intent to discriminate. . . . For the Court of Appeals to compel the district court to infer intent from effects alone in situations like the present one is to abolish the intent requirement and to abolish the further requirement that the racial separation [shall] have been caused by the acts of the State intended to affect the operation of the schools rather than, for example, the acts of private individuals choosing where to make their homes). *Austin, supra,* 76-200, Brief for the United States, at 6-7. (Emphasis added.)

The Solicitor General, in his brief on behalf of the United States in *Austin, supra,* suggests a standard by which the finder of fact can measure the significance of the retention of a neighborhood school plan in weighing whether or not school authorities have violated the Equal Protection Clause.

> . . . [W]hen a racially neutral neighborhood assignment policy produces no more separation than occurs in the residential patterns, only evidence that the school authorities acted with discriminatory intent will allow a finding that they practice racial discrimination. . . . Proof that school authorities added to racial separation may be enough to support a finding of intent; proof that school authorities failed to reduce separation attributable to forces outside the schools is never (by itself) enough. *Austin, supra,* 76-200, Brief for the United States, at 8.

Justice Powell in his concurring opinion in *Austin, supra,* emphasizes the dangers of disapproval per se of the continued use of neighborhood school zoning.

> The principal cause of racial and ethnic imbalance . . . is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, discrimination in housing—whether public or private—cannot be attributed to school authorities. Economic pressures and voluntary preferences are the primary determinants of residential patterns. *Austin, supra,* 45 L.W. 3413.[3]

Justice Powell, in his concurring opinion in *Austin, supra,* further recognized the danger of per se disapproval of the neighborhood school plan and appears to approve the standard suggested by the Solicitor General.

> The Court of Appeals did not find and there is no evidence in the record available to us to suggest that, absent those constitutional violations, the Austin school system would have been integrated to the extent contemplated by the plan. If the Court of Appeals believed that this remedy was coextensive with the constitutional violations, it adopted a view of the constitutional obligations of a school board far exceeding anything required by this Court. *Austin, supra,* 45 L.W. 3413.

---

[3]Please also see the admonition of Chief Justice Burger in *Swann, supra:* "the elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage." 402 U. S. 1, 22.

The record in *this* matter does not support a holding that any action or failure to act on behalf of the defendant school systems resulted in *more* racial segregation than is reflected by the residential patterns in the community. Indeed, the district court in its original decisions in March of 1973 specifically found that the racial compositions of the schools operated by the systems merely reflected the unfortunate racial isolation produced by segregated housing patterns in the Jefferson County metropolitan area. In light of this finding, which was undisturbed by the Court of Appeals in *Newburg I*, the continued use by the defendant school systems of neighborhood geographic school zones is racially neutral on its face and is not the proper basis of a finding of intent to segregate under this Court's decisions in *Washington* v. *Davis* and *Austin, supra*. To compel the imposition of a school desegregation remedy as a sole consequence of historical *de jure* segregation and unrelated but equally invidious residential segregation not only strips the "state action" component of the Equal Protection Clause of any meaning whatsoever, but also perpetrates an inequity upon the innocent "third parties" in desegregation litigation, the school children and their parents and families.[4]

[4]See Justice Powell's concurring opinion in *Austin, supra*, 45 L. W. 3413, 3414, fn. 7.

II. The Inclusion By the District Court in Its Desegregation Remedy of a Provision for Perpetual Realignment of Racial Quotas With a Specific "Triggering" Mechanism Demonstrates an Impermissible Goal of Racial Balance and Misapplication of the Decisions of This Court and Particularly the Concurring Opinion in *Austin Independent School District* v. *United States*.

The majority Per Curiam opinion of this Court in *Austin, supra,* vacated the judgment of the United States Court of Appeals for the Fifth Circuit in *Austin II,* remanding the case for reconsideration in light of *Washington* v. *Davis*. The majority of this Court by this action has suggested that the analysis of the courts below was sufficiently infirm on the question of whether or not there is even a constitutional violation by AISD that it was unnecessary to reach the secondary question of the appropriateness of the remedy imposed by the courts below. In the interest of judicial economy, however, Justice Powell filed a concurring opinion, in which he was joined by the Chief Justice and Justice Rehnquist, analysing in detail the specific question of the general remedial authority of the lower federal courts in the event that the United States Court of Appeals for the Fifth Circuit, on remand, reaffirmed its finding of a constitutional violation. Both the implications of this Court's majority opinion in *Austin, supra,* and the specific admonitions of Justice Powell's concurring opinion have direct and significant application to a determination of the propriety of the "remedial" desegregation plan of the district court in this matter.

The question of the *necessity* for a desegregation remedy in the first place is directly undermined by this Court's majority opinion in *Austin, supra.* The propriety of the specific remedy imposed by the district court in this matter is directly questioned by Justice Powell's concurring opinion in *Austin, supra,* and this Court's recent decisions in *Swann, Keyes, Milliken* and *Pasadena, supra.*

The desegregation plan imposed by the district court in this matter has already been discussed in detail in the petition for writ of certiorari filed herein on November 20, 1976. One provision of the district court's remedy, particularly significant in light of the analysis of Justice Powell in his concurring opinion in *Austin, supra,* is the "triggering" mechanism specifically required in the desegregation plan.

> The method of selecting students to be transported for the purpose of this desegregation plan insures that every student, within racial categories, participates as equally as possible. The only exception to this rule occurs when a student attends a school that this Court has determined is already at this time sufficiently desegregated within the guidelines set out above [60% to 88% Anglo] so that transportation is not required. *As set out hereinafter, if any individual school ratio or population changes in a material fashion, appropriate steps will be taken to include that individual school and its students in the general transportation plan.* (Pet. Appendix, pp. 55-56). (Emphasis added.)

It has already been noted that the district court, pursuant to this provision, ordered the busing of an *additional* 900 black children for the school year 1976-77 on August 2, 1976. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky., appeal docketed,* No. 76-2301, 6th Circuit, Sept. 30, 1976. Advanced on motion by the petitioners per Chief Judge Phillips, December 16, 1976.[5]

Judge Peck of the Sixth Circuit, writing for the panel in *Cunningham* v. *Grayson, supra,* approved the desegregation plan adopted by the district court in this matter, but admonished the district judge that if he meant what he said concerning the need for perpetual realignment of the plan, such provision was, in all probability, inappropriate in light of *Pasadena, supra,* 541 F. 2d 538, 542. The panel in *Cunningham, supra,* did not feel that this was a sufficient basis, however, for invalidating the plan. Justice Powell's cogent analysis in his concurring opinion in *Austin, supra,* however, points out that this type of "triggering" condition, in and of itself, is an indicium of the realization in a desegregation plan of the constitutionally impermissible goal of racial balance.

> This aspect of the plan clearly reveals that the plan is designed to achieve some predetermined

[5]As this brief went to the printers, certiorari was granted by this Court to review the Dayton case. *Brinkman* v. *Gilligan,* 539 F. 2d 1084 (6th Cir. 1976), *cert. granted,* ___ U. S. ___ (1977), 45 L.W. 3489. Although the issues in *Brinkman, supra,* and this case on the question of the appropriateness of the remedy imposed are virtually identical, at least two factual situations in the case at bar suggest an even more aggravated misapplication of the leading decisions of this Court. First, the *Brinkman* remedy does not specifically require perpetual realignment of the plan as does the remedy here. Second, the range of acceptable ratios in *Brinkman* is in its application to individual schools considerably broader than the actual ratios for individual schools compelled by the desegregation plan in this matter.

racial and ethnic balance in the schools rather than to remedy the constitutional violations committed by the school authorities. As described by the Court of Appeals, the plan is impermissible under our holding [in] *Pasadena City Board of Education* v. *Spangler*, —— U. S. —— (1976) [96 S. Ct. 2697]. *Austin, supra,* 45 L.W. 3413, fn. 3.

In light of the fact that the majority in *Austin, supra,* vacated the findings of the lower courts in *Austin I* and *Austin II* on the question of violation, the desegregation plans approved by such courts are necessarily suspect under the general equitable principle enunciated in *Swann, supra,* that the scope of a desegregation remedy is controlled by the nature of the constitutional violation in question. 402 U. S. 1, 16. The general equitable principles enumerated by Justice Powell in his concurring opinion in *Austin, supra,* however, by their singular misapplication by the district court in the fashioning of the desegregation remedy in this matter nevertheless merit comment here.

Both in the Austin plan and in the plan presently before the Court in this matter there is a requirement for a specific degree of racial balance in *every* school in the system. Similarity between *Austin II* and this matter is also seen in the dual imposition of a narrow range of acceptable racial quotas. The remarkable inflexibility and narrowness of the *range* of racial balances required by the district court here have been discussed previously in the petition for certiorari filed in this Court on November 20, 1976. It should be noted that the district court rejected in this matter a range

of constitutionally acceptable racial compositions suggested by the school system which was specifically adopted by the lower courts in *Austin II.* Justice Powell specifically criticized even these ratios in his concurring opinion in *Austin, supra,* 45 L.W. 3413.

An additional factor conclusively demonstrating the overbreadth of the desegregation plan of the district court in this matter, which appears to be without parallel in the plan affirmed by the Fifth Circuit in *Austin II,* is the requirement of the plan under review here that every school in the system have a substantial majority of white pupils. In all but nine schools out of the one hundred and seventy-seven operated by the petitioner school system, the racial quotas compelled by the desegregation plan require a majority of white pupils of 70%, or greater. The district court apparently felt that this extraordinary degree of racial balance was specifically required by the Court of Appeals' condemnation per se of the existence of "racially identifiable" black schools in *Newburg I.*

Using the rationale of the majority opinion of this Court in *Austin, supra,* the only conceivable violation by the defendant school systems in this matter concerns the underutilization of the Newburg school in light of the overutilization of nearby "white" schools and the retention of a voluntary transfer plan by the former Louisville School District. With respect to the Newburg School, the defendant school system adopted a voluntary plan of desegregation for that school which was *specifically* approved by the district court in its desegregation plan in this matter (Pet. Appendix,

p. 59). Further, the record in this matter clearly establishes that the voluntary transfer plan utilized by the Louisville School District in compliance with this Court's decision in *Brown I* as early as the 1956-57 school year, while *in theory* may have allowed black and white students to avoid the selection of desegregated schools, *in practice* has not affected the racial compositions of the schools previously operated by the former Louisville School District more than one percentage point in any school.

The massive pupil reassignment required here by the district court's desegregation order of July 30, 1975, with its concomitant large scale cross-district busing of in excess of 23,000 children is clearly inappropriate in light of the nature of the constitutional violation, if any. There has been no showing here, and indeed no attempt to demonstrate that the degree of integration attempted by the desegregation order would have existed but for the purported unconstitutional activity of the petitioners. See *Austin, supra,* 45 L.W. 3413.

In the leading decision of this Court on the question of the formulation of desegregation remedies, *Swann, supra,* Chief Justice Burger specifically admonished against an over-reliance upon racial quotas by the district courts. 402 U. S. 1, 24. Justice Powell, in his concurring opinion in *Austin, supra,* has again warned the lower courts of the erosion of the judicial system which can stem from the indiscriminate use of excessive remedies.

> I do not suggest that transportation of pupils is never a permissible means of implementing de-

segregation. I merely emphasize the limitation repeatedly expressed by this Court that the extent of an equitable remedy is determined by and may not properly exceed the *effect* of a constitutional violation. Thus, large scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past. Such a standard is *remedial* rather than *punitive* and would rarely result in the widespread busing of elementary-age children.[7] A remedy simply is not equitable if it is disproportionate to the wrong.

---

[7] . . . It is also to be remembered in granting equitable relief, that a desegregation decree is unique in that its burden falls not upon the officials or private interests responsible for the offering action but, rather upon innocent children and parents. *Austin, supra,* 45 L.W. 3413-14 (Emphasis added.)

CONCLUSION

For the reasons set forth in this supplemental brief and in the previously filed petition for writ of certiorari, it is respectfully submitted that this Court should issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit and reverse the decisions of that Court in *Newburg II* and its progeny, *Cunningham* v. *Grayson, supra,* and reinstate the original decisions of the United States District Court for the western District of Kentucky at Louisville of March 8, 1973. In the alternative, this Court, at the very least, should vacate these decisions and remand this matter to the United States Court of Appeals for the Sixth Circuit for a re-examination of that Court's

original finding of a constitutional violation in light of the recent decisions of this Court in *Austin, supra,* and *Washington* v. *Davis* with instructions that, in the event the Court of Appeals reaffirms its original finding of a constitutional violation, the necessary desegregation remedy must be *strictly* proportional to the nature of such violation and not penal in nature.

It is further urged that in the event of a grant of certiorari contemplating a review here upon the merits, this Court in light of the similarity of issues and the compelling need for uniform application of the constitutional standards controlling the disposition of this type of case, consider the contemporaneous disposition of this matter, *Brinkman, supra,* and *School District of Omaha* v. *United States,* 521 F. 2d 530 (8th Cir. 1975) and 541 F. 2d 708 (8th Cir. 1976), *cert. filed,* 45 L.W. 3401.

Respectfully submitted,

JOHN A. FULTON
WILL H. FULTON
1805 Kentucky Home Life Building
Louisville, Kentucky 40202

E. PRESTON YOUNG
722 Kentucky Home Life Building
Louisville, Kentucky 40202

Counsel for Petitioners, Board of Education of Jefferson County, Kentucky and Superintendent Ernest Grayson

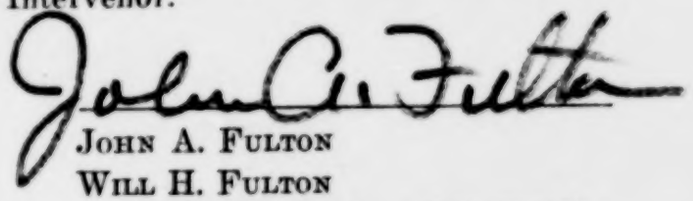
Of Counsel:

WOODWARD, HOBSON & FULTON

January 18, 1977

CERTIFICATE OF SERVICE

I hereby certify that on this 20 day of January, 1977, three copies of this Supplemental Brief in Support of Petition for Writ of Certiorari were hand delivered to: Mr. Thomas Hogan, 701 W. Walnut Street, Louisville, Kentucky, Counsel for Respondent; Mr. Henry A. Triplett, 231 S. Fifth Street, Louisville, Kentucky; and Mr. J. Bruce Miller, 1112 Kentucky Home Life Building, Louisville, Kentucky, Counsel for Intervenor.



JOHN A. FULTON
WILL H. FULTON
1805 Kentucky Home Life Building
Louisville, Kentucky 40202

Counsel for Petitioner

ADDENDUM

ADDENDUM

UNITED STATES SUPREME COURT

76-200

AUSTIN INDEPENDENT SCHOOL DISTRICT

v.

U. S., PER CURIAM

The petition for certiorari is granted, the judgment of the Court of Appeals for the Fifth Circuit is vacated, and the case is remanded for reconsideration in light of Washington v. Davis, 426 U. S. 229 (1976).

Mr. Justice Powell, with whom the Chief Justice and Mr. Justice Rehnquist join, concurring.

I concur in the action of the Court, and agree that there would be no need to address the issue of remedy if the Court of Appeals upon reconsideration of its opinion in light of Washington v. Davis, 426 U. S. 229 (1976), should conclude that there was no constitutional violation. I would nonetheless include the issue of remedy in the remand order because of what appears to be a misapplication of a core principle of desegregation cases. In such cases, this Court has repeatedly emphasized that:

> **"the task is to correct by a balancing of the individual and collective interests, 'the condition that offends the Constitution.' A federal remedial power may be exercised 'only on the basis of a constitutional violation'**

and, '[a]s with any equity case, the nature of the violation determines the scope of the remedy.'" Milliken v. Bradley, 418 U. S. 717, 738 (1974), quoting Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1, 16 (1971).

As suggested by this Court's remand premised upon Washington v. Davis, supra, the Court of Appeals may have erred by a readiness to impute to school officials a segregative intent far more pervasive than the evidence justified.[1] That court also seems to have erred in ordering a desegregation plan far exceeding any identifiable violations of constitutional rights.

As is true in most of our larger cities with substantial minority populations, Austin has residential areas in which certain racial and ethnic groups predominate in the population. Residential segregation creates significant problems for school officials who seek to achieve a nonsegregated school district. In Austin those problems are perhaps accentuated by the geography of the city.

Acknowledging these difficulties, the Court of Appeals, noted that:

"[c]ountless efforts by school officials, consultants, and visiting teams have found it impossible to produce

[1]Although in an earlier stage in this case other findings were made which evidenced segregative intent, see, e.g., United States v. Texas Education Agency, 467 F. 2d 848, 865-869 (CA 5 1972) (actions by school authorities contributing to segregation of Mexican-American students), the opinion below apparently gave controlling effect to the use of neighborhood schools:

> "At least in the Texas schools, where we have held that Mexican-American students are entitled to the same benefits of Brown as are blacks, school authorities may not constitutionally use a neighborhood assignment policy creating segregated schools in a district with ethnically segregated residential patterns. A segregated school system is the foreseeable and inevitable result of such an assignment policy. When this policy is used, we may infer that the school authorities have acted with segregative intent." App. to Pet. for Cert., at 20.

> significant desegregation by boundary line changes, contiguous pairing of schools, magnet schools, or other effective means short of cross-town busing incident to non-contiguous pairing of . . . schools. . . ." App. to Pet. for Cert., at 26.

The Court of Appeals then concluded that nothing short of extensive cross-town transportation would suffice.

Designed to achieve a degree of racial balance in every school in Austin,[2] the desegregation plan endorsed by the Court of Appeals is remarkably sweeping. For kindergarten through eighth grade, the plan requires cross-town busing of all students in schools that are over 50% minority or 90% Anglo.[3] For kindergarten through fourth grade,

[2]Apparently misconceiving the import of language in Green v. County School Board of New Kent County, 391 U. S. 430, 442 (1968), to the effect that there should be no "Negro" school or "white" school, the Court of Appeals seems to believe every school must be racially balanced to some degree. Green involved a rural, sparsely populated county with only two schools. Much of its language is irrelevant to a large urban school system. Moreover, the effect of applying the language of Green to such a system may be to stigmatize—without justification—schools that can be identified as having a racial or ethnic majority. The Solicitor General, speaking for the United States in this case, commented that "there is nothing inherently inferior about all-black schools, any more than all-white schools are inferior, when the separation is not caused by state action." Brief for the United States, at 8 n. 5.

[3]This "triggering" condition of the plan requires further comment. Describing it, the Court of Appeals stated as follows:

> "Elementary and junior high schools that are between 50 and 90 percent Anglo are defined as 'naturally desegregated' and would remain unchanged. *When changing demographic patterns cause any of these schools to fall outside of the 'naturally desegregated' range, the schools would be brought within the Finger Plan 4-4-4 system.*" App. to Pet. for Cert., at 28 (emphasis added).

This aspect of the plan clearly reveals that the plan is designed to achieve some predetermined racial and ethnic balance in the schools rather than to remedy the constitutional violations committed by the school authorities. As described by the Court of Appeals, the plan is impermissible under our holding Pasadena City Board of Education v. Spangler, ___ U. S. ___ (1976).

the students in East Austin attending the relevant schools will be bused through the congested center of the city to West Austin. For fourth through eighth grade, the flow will be reversed. The high schools will be integrated by a system of "feeder" schools. This plan requiring transportation of from 18,600 to 25,000 students, consisting of from 32% to 42% of the entire school population,[4] was ordered despite the District Court's conclusion that such a plan would involve a "risk to health and probable impingement of education for students younger than the sixth grade. . . ." App. to Pet. for Cert., at 53.

Whether the Austin school authorities intentionally discriminated against minorities or simply failed to fulfill affirmative obligations to eliminate segregation, see Keyes v. School District No. 1, Denver, Colorado, 413 U. S. 189, 217-253 (1973), (Powell, J., concurring in part and dissenting in part), the remedy ordered appears to exceed that necessary to eliminate the effect of any official acts of omissions. The Court of Appeals did not find and there is no evidence in the record available to us to suggest that, absent those constitutional violations, the Austin school system would have been integrated to the extent contemplated by the plan. If the Court of Appeals believed that this remedy was co-extensive with the constitutional violations, it adopted a view of the constitutional obligations of

[4]In defending the high percentage of children proposed to be bused in Austin, the Court of Appeals relied on superficially comparable percentages of children that were to be transported under the plan approved in Swann. The school district before the Court in Swann included Mecklenberg County as well as the city of Charlotte. As the Court said: "The area is large—550 square miles—spanning roughly 22 miles east-west and 36 miles north-south." 402 U. S. at 6. Although it included a metropolitan area, much of the district was rural, requiring the transportation of pupils quite apart from desegregation efforts. Because of this situation in Swann, it is unduly simplistic to compare the percentages of children bused. The situation in Austin is simply not comparable.

a school board far exceeding anything required by this Court.

The principal cause of racial and ethnic imbalance in urban public schools across the country—North and South—is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, discrimination in housing—whether public or private—cannot be attributed to school authorities. Economic pressures and voluntary preferences[5] are the primary determinants of residential patterns.

I do not suggest that transportation of pupils is never a permissible means of implementing desegregation.[6] I merely emphasize the limitation repeatedly expressed by this Court that the extent of an equitable remedy is determined by and may not properly exceed the effect of the constitutional violation. Thus, large-scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past. Such a standard is remedial rather than punitive, and would rarely result in the widespread busing of elementary-age children.[7] A

[5]See Keyes, 413 U. S. at 224-253 (Powell, J., concurring in part and dissenting in part). The tendency of citizens of common national or ethnic origins to form homogeneous residential patterns in our cities is a familiar demographic characteristic of this country.

[6]See id., at 242-252.

[7]A related equitable principle, also applicable in fashioning a desegregation remedy, is that a court has the duty to "balanc[e] . . . the individual and collective interests." Milliken v. Bradley, 418 U. S., at 738. The individual interests at issue here are as personal and important as any in our society. They relate to the family, and to the concern of parents for the welfare and education of their children—especially those of tender age. Families share these interests wholly without regard to race, ethnic origin, or economic status. It also is to be remembered, in granting equitable relief, that a desegregation decree is unique in that its burden falls not upon the officials or private interests responsible for the offending action but, rather upon innocent children and parents.

remedy simply is not equitable if it is disproportionate to the wrong.

Mr. Justice Brennan and Mr. Justice Marshall dissent because they are persuaded that the Court of Appeals correctly interpreted and applied the relevant decisions of this Court.